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Supreme Court, U.S.
FILED

021395 MAR 19 2003

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No. 02-

IN THE

Supreme Court of the United States

WALTER A. CHRUBY,

Petitioner,

v.

FRANK GILLIS, SUPERINTENDENT,
SCI COAL TOWNSHIP,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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March 19, 2002

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QUESTIONS PRESENTED

1. Whether petitioner's counsel's performance – which included breaking a repeated promise made in a delayed opening statement to present petitioner's testimony and conceding petitioner's guilt of a charged crime – was so deficient that prejudice should have been presumed and ineffective assistance found?

2. Whether petitioner's probation officer, who was acting as an agent for police investigating a murder, was required to advise petitioner of his *Miranda* rights prior to interrogating him on behalf of those police who were waiting nearby to arrest him pursuant to a warrant on an unrelated charge?

PARTIES TO THE PROCEEDING

All parties to the proceeding below are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Walter A. Chruby, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-12a) was entered on November 29, 2002, and is not reported. The order denying Petitioner's petition for rehearing en banc (App. 25a-26a) was entered on January 13, 2003 and is not reported. The opinion of the United States District Court for the Middle District of Pennsylvania denying petitioner's petition for a writ of habeas corpus (App. 13a-24a) was entered on June 11, 2001, and is not reported.

JURISDICTION

The court of appeals entered its opinion on November 29, 2002. Petitioner timely filed a petition for rehearing en banc which was denied January 13, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fifth Amendment of the United States Constitution provides in pertinent part:

> [N]or shall [any person] be compelled in any criminal case to be a witness against himself.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), see 28 U.S.C. § 2254, provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

This case arises from the Third Circuit Court of Appeals' denial of Petitioner's petition for a writ of habeas corpus. In the court of appeals, Petitioner challenged the constitutionality of his state court conviction of first-degree murder and related crimes on two grounds: First, he asserted that at his trial for capital murder, his counsel's performance was so profoundly deficient that prejudice should have been presumed and, in the alternative, that he had in fact been prejudiced. Second, he claimed that his probation officer, who was acting as an agent for the police, was required to advise him of his *Miranda* rights prior to interrogating him on

behalf of the police officers waiting in the next room to execute a warrant for his arrest. See *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The district court denied the petition and refused to issue a certificate of appealability. The Third Circuit granted the certificate of appealability, but ultimately denied the petition. Petitioner seeks review of that decision in this Court because the decision below (a) contravenes this Court's decisions concerning the presumption of prejudice arising from certain kinds of ineffective assistance of counsel and concerning the legal standards to be used in determining actual prejudice, and (b) unreasonably extends this Court's decision in *Minnesota* v. *Murphy*, 465 U.S. 420 (1984), far beyond its intended scope and in so doing subverts *Miranda*.

1. The prosecution at issue arose from the murder of Ruth Fergus in September 1995. Petitioner became a suspect pursuant to a confidential tip. Tr. of Trial at 17-18 (June 16, 1997). The police investigating the murder discovered that Petitioner had been recently released from prison, that he was on parole, and that he was wanted for passing a bad check of $17 some months before, prior to his imprisonment. *Id.* at 212.

On September 6, 1995, the police therefore contacted Petitioner's parole officer, Parole Officer Fox, who was employed in the Harrisburg, Pennsylvania parole office and who had been assigned to supervise Petitioner upon his release from prison. App. at 3a. On September 7, the police officers came to the parole officer's office, and "told him that [Petitioner] was a suspect in a homicide investigation but that they did not have enough evidence to charge him." *Id.* Specifically, the police informed the parole officer that Petitioner was a suspect in the murder of Ruth Fergus and that they had a warrant for his arrest on a bad check charge; and they requested the parole officer's assistance. *Id.*

The police officers requested that the parole officer question Petitioner when he reported for his parole interview on matters related to the investigation (*i.e.*, how he had

traveled to his interview, where he was staying, where his vehicle was parked, and where he had been during the previous days, App. at 3a) and report to the police what was learned. See *id.* ("[a]ccording to Fox, the police asked him to interrogate [Petitioner] about matters related to their criminal investigation, such as where he had been presently staying, where he had been for the past couple of days, where the car was, and how he got to the appointment in Harrisburg from State College"). The police also asked Officer Fox to take a photograph of Petitioner. *Id.* at 8a. They intended to glean what information they could from the parole officer's questioning and then arrest Petitioner based on the outstanding warrant on the bad check charge. *Id.* at 3a. Execution of the outstanding arrest warrant was to be used to further a wholly separate murder investigation. Officer Fox agreed to act as a police agent.

In a post-sentence motion hearing, Petitioner testified that "he was frisked when he entered the federal building [for his parole interview] and that he was frisked as soon as he entered Fox's office." App. at 8a. In addition, when Petitioner reported for the meeting, the police observed his entry through the lobby and then stationed themselves in the room across the hall from the parole office. Petitioner testified that he saw the officers and "thought they were there to talk to him about the car he had stolen." *Id.* When the interview commenced, Officer Fox asked Petitioner, *inter alia*, questions regarding where he had parked, and how he had gotten to the office. Petitioner said that he had parked in the Walnut Street Garage across from the federal building, but also said that a friend named "Dave" had driven him to the meeting. *Id.* at 3a. Then, they discussed supervised parole and Petitioner's pending arrest warrant. *Id.* at 3a-4a. At the conclusion of the meeting, the police arrested Petitioner on the warrant they obtained on the bad check allegation. *Id.* at 4a.

As Officer Fox reported the results of his questioning, the police searched Petitioner and found a car key and a parking receipt. When asked where he parked the car, Petitioner denied ownership of the car and said that he had been driven to the meeting by a friend. App. 4a, 20a. At this point, Petitioner still had not been read his *Miranda* rights. *Id.* at 20a. Using Petitioner's answers and these items, the police located Ruth Fergus' car in a nearby parking garage. The key found in Petitioner's pocket fit into the ignition. *Id.* at 4a. On October 4, 1995, the Commonwealth filed a criminal information against Petitioner charging him with, *inter alia*, the murder of Ruth Fergus.

In preparing for trial, Petitioner informed his counsel, Mr. Lysaght, that he was innocent and that he wanted to testify. Affidavit of Walter Chruby ¶¶ 3, 5, 7 (App. 27a-28a). He provided Mr. Lysaght with information about evidence that, if obtained, would have supported his timeline and alibi defense. *Id.* ¶¶ 2, 4 (App. 27a). Mr. Lysaght informed not only Petitioner, but his co-counsel, Ms. Stephanie Cooper, and members of Petitioner's family that he had taken numerous steps to prepare Petitioner's defense, including obtaining "all of the critical evidence/witnesses that were to support [Petitioner's testimony]." *Id.* ¶ 8 (App. 28a). Part of this purported preparation was subpoenaing a witness, David Nieves, who testified at Petitioner's preliminary hearing that he observed an individual not remotely matching Petitioner's description emerge from the motel room Petitioner had occupied with a bandage on his face and leave the premises in a white car. See Tr. of Prelim. Hr'g at 110-21 (Sept. 14, 1995). As Stephanie Cooper averred, "upon joining the defense, I met with attorney Gary Lysaght and had a detailed discussion regarding [Petitioner's] version of events on the day of the homicide, at which time Mr. Lysaght stated that he was planning to offer a timeline/alibi defense," and "Mr. Lysaght confirmed unequivocally to [Petitioner], members of his family, and co-counsel that he had obtained critical

evidence and witnesses that would support his testimony." Affidavit of Stephanie L. Cooper ¶¶ 2, 5 (App. 32a); Affidavit of Joseph Accordino, Jr. ¶¶ 4, 5 (App. 36a-37a). Mr. Lysaght's claims were later proven to be false, see *infra* at 8.

Petitioner was tried in the Centre County, Pennsylvania Court of Common Pleas. At trial, because there were no eyewitnesses to the murder, the Commonwealth presented a wholly circumstantial case. Petitioner's status as a parolee and the statements he made to Officer Fox were featured, as was the evidence discovered as a result of the interview. *Inter alia*, the Commonwealth established that Petitioner was in possession of items stolen from Ruth Fergus, including a credit card found in the car, App. 4a, 20a, evidence Petitioner intended to explain in his planned testimony. Chruby Aff. ¶¶ 10, 14, 28 (App. 28a, 29a, 31a). In addition, the Commonwealth presented evidence that Petitioner and the victim had met in 1995 and motel records indicating that a call was placed from Petitioner's room to the victim's residence on September 1, 1995, App. 11a, again evidence that Petitioner intended to dispute in his testimony.

The defense made a delayed opening statement to the jury after the Commonwealth had presented its case-in-chief.[1] Prior to that opening, Petitioner repeated to Mr. Lysaght his decision to testify. Chruby Aff. ¶ 10 (App. 28a). In his opening, Mr. Lysaght *four times* promised the jury that Petitioner would testify and provide his version of the events that took place. App. 4a. See also Cooper Aff. ¶ 9 (App. 33a). Counsel was aware that "[Petitioner] intended to explain to the jury that after finding the victim's car abandoned and unoccupied, he took it because he was in desperate need of transportation" and that "the victim's credit

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[1] Indeed, Mr. Lysaght informed Petitioner that he was making a delayed opening to "have the opportunity of hearing the Commonwealth's entire case against [Petitioner] before informing the jury that [he] would indeed testify." Chruby Aff. ¶ 9 (App. 28a).

card had been left inside the abandoned vehicle." *Id.* ¶¶ 7, 8 (App. 33a). Counsel was also aware that Petitioner intended to testify that he did not place a call to the victim's house. Accordino Aff. ¶ 5(a) (App. 37a). Moreover, Mr. Lysaght stated in the delayed opening that Petitioner was guilty of two of the charges against him, related to crimes he knew that Petitioner intended to testify that he did not commit. Specifically, although Petitioner had told Mr. Lysaght that he had "never used the victim's credit card nor . . . been charged with using anyone[']s credit card illegally," Chruby Aff. ¶ 14 (App. 29a), Mr. Lysaght nonetheless told the jury "that [Petitioner] used the victim's credit card and had stolen her car." App. 4a; Chruby Aff. ¶ 13 (App. 29a).

Mr. Lysaght, accordingly, knew that Petitioner intended to testify in a way that contradicted the Commonwealth's case. He did not, however, prepare Petitioner to testify, but instead threatened Petitioner by informing him after the delayed opening that he would get "the needle" – the death penalty – if he testified. App. 4a; Chruby Aff. ¶ 17 (App. 29a); Cooper Aff. ¶ 19, 23 (App. 34a-35a); Accordino Aff. ¶ 11 (App. 38a). In addition, Mr. Lysaght had placed Petitioner in the wholly untenable position of having to contradict his counsel by saying that he had not stolen the victim's card or of testifying to a crime he had informed counsel that he did not commit. Chruby Aff. ¶ 15 (App. 29a).

Moreover, although Mr. Lysaght had assured Petitioner's family and his co-counsel that he had taken many steps in preparation for trial and fully investigated Petitioner's alibi defense and supporting evidence, in fact, he had done nothing. See Cooper Aff. ¶ 10 (App. 33a) ("at the onset of the defense portion of the case, it became painfully apparent that Mr. Lysaght had prepared absolutely no defense whatsoever").[2] For example, Mr. Lysaght had stated that he

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[2] At this point, co-counsel suggested to Petitioner that she have an *ex parte* meeting with the trial judge to request a continuance so that

had phone records which would have proven that Petitioner did not make the phone call from his motel room to the home of the victim; during the trial, he admitted to his co-counsel and Petitioner's family that he had not obtained those records. Accordino Aff. ¶ 5(a) (App. 37a). Prior to trial, Mr. Lysaght had also stated that he had obtained records to prove that Petitioner did not leave the federal facility where he had been confined, FCI Butner, with a belt that was used to link him to the murder; Mr. Lysaght later changed his story, saying that he had successfully moved to have the belt excluded from evidence at the trial. Both versions were false, and the belt was admitted at trial. *Id.* ¶ 5(b), (c), (d), (e) (App. 37a). Mr. Lysaght had also informed Petitioner, his co-counsel, and others that his private investigator was serving subpoenas, including a subpoena on David Nieves, as the trial progressed; but when co-counsel contacted the private investigator, the latter was not aware the trial had started and had not spoken to Mr. Lysaght in months about Petitioner's case. Chruby Aff. ¶ 20 (App. 29a); Cooper Aff. ¶ 13 (App. 34a).

In fact, Mr. Lysaght prepared no defense. He subpoenaed no witnesses. Cooper Aff. ¶ 10 (App. 33a). He obtained no evidence in support of Petitioner's timeline defense. Accordino Aff. ¶ 7 (App. 38a). In the end, Petitioner's co-counsel did their "best to assemble some sort of defense," but "were unable to do this in an effective manner and were left with presenting the type of evidence appropriate for a penalty phase." Cooper Aff. ¶ 15 (App. 34a). In addition, a forensic pathologist testified that, although he would have expected hairs and fibers from Ruth Fergus' attacker to be located at the scene, none of Petitioner's hairs nor fibers from his clothes were found there. Tr. of Trial at 32 (June 25, 1997).

Petitioner could retain new counsel or co-counsel could prepare the defense. The judge denied this request, and Petitioner was required either to proceed pro se or without lead counsel. Cooper Aff. ¶¶ 11, 12 (App. 33a-34a).

On June 25, 1997, the jury convicted Petitioner of First Degree Murder, Robbery, Burglary, Criminal Trespass, Theft, and a credit card violation. He was sentenced to life imprisonment and additional time on the remaining counts. App. 13a.

2. Petitioner noted an appeal to the Superior Court of Pennsylvania on December 29, 1997. In that appeal, he presented four issues, including

> (1) whether trial counsel was ineffective in failing to investigate an alibi defense; (2) whether trial counsel's statements to the jury in his opening that [Petitioner] would testify and then the subsequent failure of [Petitioner] to testify amounts to ineffective assistance of counsel; (3) whether [Petitioner's] parole officer acted as an agent of the state and, thus, was required to give [Petitioner] his *Miranda* rights prior to questioning him regarding the murder; and (4) whether the Commonwealth committed prosecutorial misconduct in stating that a stain on defendant's sock was the blood of the victim, who was crying out from the grave for the jury to find him guilty. [App. 14a (footnote omitted).]

On March 9, 1999, the Superior Court denied Petitioner's appeal. See *Commonwealth* v. *Chruby*, 737 A.2d 1270 (Pa. Super. Ct. 1999) (unpublished table decision). On April 4, 1999, Petitioner filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania; he amended that petition on April 7, 1999. The Supreme Court denied his petition on July 15, 1999. See *Commonwealth* v. *Chruby*, 740 A.2d 1144 (Pa. 1999) (unpublished table decision).

3. On July 13, 2000, Petitioner filed his petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania. In that petition, he challenged the state court's ruling with respect to the statements made to his parole officer and his counsel's ineffectiveness. The district

court ruled that both claims had been exhausted. App. 14a, 18a.

As it was required to do, the court reviewed Petitioner's petition under the standard set forth in AEDPA, 28 U.S.C. § 2254(d), which precludes federal habeas relief of claims adjudicated on the merits in state court "unless the adjudication of the claim involved an unreasonable determination of the facts in light of the evidence presented or 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.'" App. 18a (quoting 28 U.S.C. § 2254(d)(1)).

The court first rejected Petitioner's claim that under the circumstances presented here, Officer Fox should have given Petitioner *Miranda* warnings prior to questioning him on matters related to Ruth Fergus' murder. Relying on this Court's decision in *Minnesota* v. *Murphy*, 465 U.S. 420 (1984), the court held that a parolee being interviewed by a parole officer is not entitled to *Miranda* warnings unless that parolee is subject to formal arrest or restraint on freedom of movement. App. 20a. The court found that "this conclusion was not based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." *Id.* The court considered irrelevant the fact that the police had scripted the interview. *Id.* In addition, the court found that Petitioner was arrested before the police officers knew how he had answered the questions put to him by Officer Fox. *Id.* at 21a. Thus, the court held in the alternative, that the car key and parking stub were "not found as a result of unlawfully obtained statements but were discovered during a search conducted pursuant to a lawful arrest." *Id.*

The court then rejected Petitioner's ineffective assistance claim. The court acknowledged that counsel had promised the jury that Petitioner would testify and then did not call him to the stand. Applying this Court's test in *Strickland* v.

Washington, 466 U.S. 668, 687 (1984), the court held that counsel was not ineffective "because there was no evidence that counsel interfered with Defendant's right to testify." App. 21a-22a. In addition, the court decided that "there was no prejudice because the trial court instructed the jury that [Petitioner] had a constitutional right not to testify." *Id.* The court acknowledged Petitioner's testimony in connection with post-sentence motions that his counsel had convinced him not to testify by telling him "that 'if [he] took the stand, [he] was going to get the needle'" and what is more, that his lawyer had entirely failed to prepare Petitioner to testify. *Id.* (alterations in original). The court decided that even if this evidence were accepted, counsel had not interfered with Petitioner's right to testify. *Id.* at 23a. Finally, the court stated that Petitioner had not demonstrated that he was prejudiced by his counsel's conduct. *Id.*

Accordingly, on June 11, 2001, the court denied the petition for habeas corpus and found no basis to grant a certificate of appealability.

4. By order entered April 18, 2002, the Court of Appeals for the Third Circuit granted a certificate of appealability with respect to both issues raised in Petitioner's petition. After briefing and argument, however, the court of appeals affirmed the district court's decision denying the petition.

Applying the standard of review set forth in section 2254(d)(1), the court considered whether the state court's decision was "contrary to" or "an unreasonable application of" clearly established law determined by the Supreme Court. See *Williams* v. *Taylor*, 529 U.S. 362, 391 (2000). The court first held that under *Minnesota* v. *Murphy*, "a probationer must timely assert his Fifth Amendment privilege when questioned by his probation officer if the probationer's privilege is to be preserved" unless the probationer is in custody. App. 6a. The court decided that the record of the hearing on Petitioner's motion to suppress contained no evidence suggesting that he felt he was not free to leave and

that "even in light of [Petitioner's] testimony during a hearing on post-sentence motions, . . . a reasonable person in his circumstances would not feel that he was not free to leave." *Id.* at 7a-8a. In the alternative, the court held that "the officers would have discovered the car key and thereby the incriminating evidence in the car" pursuant to a valid search incident to arrest. *Id.* at 9a.

The court also rejected Petitioner's ineffective assistance claim, applying the *Strickland* test. The court acknowledged that:

> [t]he troubling aspect of trial counsel's performance is that he delivered an opening statement after the close of the prosecution's case. At that point he had heard the evidence against his client and was in a good position to determine whether or not to call him to the stand. Moreover, if he was unsure at that point whether [Petitioner] should testify, he probably should not have promised the jury that [Petitioner] would take the stand in his defense. [App. 9a-10a.]

The court "[a]ssum[ed] that [Petitioner] ha[d] shown that counsel's errors were 'professionally unreasonable,'" but held that he had not been prejudiced by those errors in light of "the strength of the Commonwealth's case." *Id.* at 10a, 11a. The court did not address whether counsel's errors should have been presumed to result in prejudice. Moreover, in addressing prejudice, the court considered only the Commonwealth's case, and failed to consider the evidence that would have been presented if counsel's errors had not occurred.

5. Petitioner sought rehearing en banc which was denied January 13, 2003. This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

I. PREJUDICE SHOULD BE PRESUMED BASED ON COUNSEL'S DEFICIENT PERFORMANCE; AT THE VERY LEAST, THE CONCLUSION THAT PETITIONER WAS NOT PREJUDICED IS BASED ON AN ERROR OF LAW.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. That right is "fundamental to our system of justice." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Indeed, "[t]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland*, 466 U.S. at 685.

In *Strickland*, this Court announced a two-part test to govern ineffective assistance of counsel claims alleging attorney error. First, the defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, the defendant must show that "the deficient performance prejudiced the defense," in the sense that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687, 694. Although the possibility of a different outcome must be substantial to establish prejudice, it may be less than 50 percent. *Id.* at 693. See *id.* at 694 (a "reasonable probability" is less than a preponderance; "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome").

In certain carefully defined contexts, however, the Court does not require that prejudice be demonstrated. Instead, the

Court presumes prejudice if a defendant is completely denied the presence of counsel at a critical stage of the proceedings, if "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," or if circumstances would render a competent lawyer unable to render effective assistance (*e.g.*, in a conflict of interest). See *United States* v. *Cronic*, 466 U.S. 648, 659 (1984); *Bell* v. *Cone*, 122 S. Ct. 1843, 1851 (2002).

The *Strickland* principles described above are "'clearly established'" for purposes of review under AEDPA and section 2254(d). See *Williams*, 529 U.S. at 391. In this case, the lower courts applied this Court's legal framework for assessing claimed violations of the Sixth Amendment right to counsel in a way that contradicts these clearly established principles and reaches a result contrary to that mandated by controlling Supreme Court precedent. *Id.* at 405-06. Accordingly, this Court should grant the petition to eliminate the conflict between this case and its own decisions and to resolve the important legal issues about prejudice that arise in this case.

A. A Presumption of Prejudice Arises From Counsel's Deficient Performance.

As set forth above, the performance of Mr. Lysaght – Petitioner's counsel – was remarkably deficient in a number of respects. Most striking, however, was his broken promise to the jury that Petitioner would testify and offer an explanation of his whereabouts at the time of the murder. He made this testimony "the centerpiece of the defense" and "announce[d] that fact to the jury in his opening statement" and then apparently decided that petitioner should not testify. *Ouber* v. *Guarino*, 293 F.3d 19, 27 (1st Cir. 2002). Prior to this Court's decision in *Bell* v. *Cone*, the courts of appeals had unanimously concluded that this breed of misconduct was so inherently prejudicial that prejudice should be presumed. Since *Bell* v. *Cone* was decided, however, the First and Third Circuits have erroneously concluded that a broken promise of

the defendant's testimony is not inherently prejudicial. This interpretation of *Bell* v. *Cone* is incorrect and warrants certiorari review.

As set forth above, Petitioner's counsel delivered a delayed opening statement – that is, a statement *after* the Commonwealth had put on its direct case. Accordingly, at that point, counsel was fully cognizant of the strength of the Commonwealth's case and, indeed, precisely what that evidence would and would not show. In that delayed opening statement, Mr. Lysaght promised no less than four times that Petitioner would testify on his own behalf and that he would explain his whereabouts at the time of the murder. Mr. Lysaght then not only failed to call Petitioner as a witness, but threatened him in order to prevent that testimony stating that Petitioner would "get the needle" if he testified. Mr. Lysaght offered no strategic explanation for his decisions.[3]

There can be none. The courts of appeals have concluded that in these circumstances, there is no conceivable strategic justification for this sequence of decisions. This performance was plainly deficient:

> Taken alone, each of these decisions [announcing to the jury that the defendant would testify and later advising the defendant not to testify] may have fallen within the broad universe of acceptable professional judgments. Taken together, however, they are indefensible. Neither the state court nor the Commonwealth has managed to identify any benefit to be derived from such a decisional sequence, and we are unable to see the combination as

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[3] At the post-trial hearing, Mr. Lysaght belatedly suggested an ethical concern with Petitioner's testimony, but no lower court accepted this suggestion which was simply a post hoc attempt to justify counsel's abysmally deficient performance. Petitioner, his brother-in-law, and Mr. Lysaght's co-counsel each testified that Mr. Lysaght never expressed any ethical concerns to Petitioner or to them about Petitioner's intended testimony. Chruby Aff. ¶¶ 26-27 (App. 30a); Accordino Aff. ¶¶ 14-15 (App. 39a); Cooper Aff. ¶ 24 (App. 35a).

> part and parcel of a reasoned strategy. We therefore conclude that, in the absence of unforeseeable events forcing a change in strategy, the sequence constituted an error in professional judgment. [*Ouber*, 293 F.3d at 27.]

Prior to this Court's decision in *Bell* v. *Cone*, this analysis would have been the end of the matter. The courts would have held that Mr. Lysaght's conduct was so inherently prejudicial that no inquiry was necessary, and concluded that he was ineffective under *Strickland*. That was the conclusion of the First and Third Circuit when they addressed this question in virtually identical circumstances. See *Anderson* v. *Butler*, 858 F.2d 16 (1st Cir. 1988) (holding that counsel was ineffective for promising the jury during an opening statement that he would present certain testimony and then failing to call the witnesses specified although they were available); *McAleese* v. *Mazurkiewicz*, 1 F.3d 159, 166 (3d Cir. 1993) ("failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffectiveness of counsel").

Both of these courts of appeals have now incorrectly interpreted *Bell* v. *Cone* to require a prejudice inquiry even when counsel promises the jury that the defendant will testify and then reneges on that promise. See *Ouber*, 293 F.3d at 33 (rejecting *Anderson* and holding that "the circumstances of this case do not fall within the contours of any of the three recognized exceptions to the *Strickland* formulation, a presumption of prejudice cannot be condoned"); App. 10a-11a (applying prejudice analysis). This is an erroneous overeading of this Court's decision.

This Court has long recognized the unique importance of a criminal defendant's testimony. See, *e.g.*, *Green* v. *United States*, 365 U.S. 301, 304 (1961) ("[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself"); *Ouber*, 293 F.3d at 28 (a "defendant has the right to testify in

[his] own defense, and, when such testimony is proffered, the impact on the jury can hardly be overestimated"). Indeed:

> When a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, *common sense suggests that the course of the trial may be profoundly altered*. A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made. [*Id.* (emphasis supplied).]

The question whether the court should presume prejudice "turns on the magnitude of the deprivation of the right to effective assistance of counsel." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 482 (2000). The error that occurred here is monumental; it is virtually impossible to imagine any circumstance involving a delayed opening statement in which a defendant would not be prejudiced by his or her counsel's decision repeatedly to promise that his or her client would testify and then to renege on that promise. There is no possibility in such circumstances that the decision was a strategic response to the government's case; the only possible conclusion that the jury can draw is that the *defendant's counsel cannot be trusted and therefore that the entirety of the defense is untrustworthy*. As a result, this is one of those "circumstances that [is] so likely to prejudice the accused that the cost of litigating [its] effect in a particular case is unjustified." *Chronic*, 466 U.S. at 658. Put differently, the courts should not accord a "presumption of reliability" to judicial proceedings in which counsel has so clearly demonstrated that he is not reliable. See *Smith* v. *Robbins*, 528 U.S. 259, 286 (2000).

Equally to the point, in the circumstances presented here, petitioner was effectively denied counsel with respect to an opening statement, a "critical stage of the proceeding[s]." *Cronic*, 466 U.S. at 659 n.25. See also *Hunter* v. *Moore*, 304 F.3d 1066, 1070-71 (11th Cir. 2002) (closing argument is a "'critical stage'" of a trial). An opening that consists of

broken promises concerning a defense that will never come to pass cannot be considered an opening by competent counsel. This aspect of the deficient opening by itself requires that prejudice be presumed and therefore that ineffective assistance be found.

Moreover, here the broken promise is not the only aspect of Mr. Lysaght's deficient conduct exhibited in the opening statement from which prejudice should be presumed. In addition, in the delayed opening, Mr. Lysaght also stated that Petitioner had committed crimes that Petitioner denied that he had committed. This conduct is clearly deficient as a matter of law. *United States* v. *Holman*, 314 F.3d 837, 843 (7th Cir. 2002) ("an attorney's concession of a client's guilt without any indication of the client's consent to the strategy is deficient conduct for *Strickland* purposes"); *United States ex rel. Ross* v. *Franzen*, 668 F.2d 933, 938 (7th Cir. 1982) (stipulating to facts that prove guilt is deficient performance); but see *Haynes* v. *Cain*, 298 F.3d 375 (5th Cir.) (en banc), *cert. denied*, 123 S. Ct. 676 (2002). Nor can it be denied that a concession that a client is guilty of a crime deprives the client of any defense with respect to the crime at issue. Again, this opening was deficient and prejudice must be presumed.

Finally, the record is clear that Mr. Lysaght had prepared no defense whatsoever and utterly failed to put on the defense that he and Petitioner had agreed upon – an alibi/timeline defense, including an acknowledgement of Petitioner's connection to the victim's car, articulated by Petitioner's testimony and supported by evidence related to phone records and the belt that would buttress his version of events, as well as by testimony concerning another individual emerging from the motel room used by Petitioner and leaving the premises in a white car. See *supra* at 5, 8. See *Williams* v. *Taylor*, 529 U.S. 362 (2000); *Kimmelman* v. *Morrison*, 477 U.S. 365, 385-86 (1986) (counsel's failure to conduct pretrial discovery and failure timely to file suppression motion was prejudicial

because unreasonable and below prevailing professional norms). Cf., *e.g.*, *Pavel* v. *Hollins*, 261 F.3d 210, 216-26 (2d Cir. 2001) (counsel's failure to prepare a defense, call important fact witnesses and call medical expert amounted to deficient performance). In these circumstances – where the defense agreed upon by lawyer and client was not made – the prosecution's case simply was never subjected to meaningful adversarial testing. For this reason, too, prejudice should have been presumed from Mr. Lysaght's deficient conduct.

This Court should grant the petition for certiorari to address the important question whether prejudice should be presumed when counsel falsely promises in a delayed opening that a defendant will testify and whether prejudice should, at the very least, have been presumed under the totality of circumstances presented in this case.

B. The Court Of Appeals Applied The Wrong Standard In Assessing Whether Petitioner Was Prejudiced By His Counsel's Deficient Performance.

Assuming that Petitioner had to show that he was prejudiced by his counsel's profoundly deficient performance, the lower court's conclusion that he was not prejudiced rests on clear legal error and cannot stand. In deciding whether a defendant was prejudiced by counsel's deficiencies, this Court has made it clear that a court is to consider not simply the course of the proceeding that actually occurred, but to assess *what would have occurred had counsel's performance been adequate*. See *Strickland*, 466 U.S. at 693-94 (the question is whether there is a strong possibility that counsel's deficient performance affected the outcome of the trial). That is also the rule in other courts of appeals. See, *e.g.*, *Ouber*, 293 F.3d at 33 (assessing whether "the trial might have ended differently absent the lawyer's blunder" and explaining that this is "normally a difficult endeavor"). Here, however, the court of appeals assessed only the evidence actually admitted at trial and utterly failed to determine whether there is a

reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.

Here, the Third Circuit related in detail the evidence that the Commonwealth presented against Petitioner. The court concluded that this evidence was strong and therefore that Petitioner had not been prejudiced by his counsel's deficient performance. App. 10a-11a. The apparent strength of the wholly circumstantial case against Petitioner, however, is directly attributable to trial counsel's numerous failures.

First, and most notable, is the absence of Petitioner's promised testimony. Had he testified, he would have explained his whereabouts on the day of the murder, his discovery of the car some distance from the victim's home, and the desperate need for transportation which resulted in his taking an apparently abandoned vehicle. This alternative explanation for his possession of the car was never heard by the jury because, after developing a trial strategy that apparently rested solely on Petitioner's testimony, Mr. Lysaght did not present that testimony. The court of appeals simply did not consider whether the jury was likely to remember Mr. Lysaght's promise of Petitioner's testimony, the substance of Petitioner's intended testimony, and the nature of the inference that the jury drew from Petitioner's failure to testify, in light of counsel's promise. Here, as in *Ouber*, "[t]he attorney made the promises explicitly and repeatedly" and there can be no doubt that the jury was anticipating Petitioner's testimony. 293 F.3d at 34. Plainly, the court should have conducted this analysis under this Court's jurisprudence, and it was prejudicial to Petitioner not to have his alternative version of events presented to the jury, particularly when counsel had promised to provide it. Cf. *id.* ("the jury never had an opportunity to assess the conflicting testimony"). As the *Ouber* court concluded, "[b]ecause the error was egregious, we are fully persuaded that, but for its commission, a different outcome might well have eventuated").

Second, Mr. Lysaght's opening statement was also defective in its substance. Relevant here, Mr. Lysaght informed the jury that Petitioner had committed credit card crimes and that Petitioner had used the victim's credit card. As Mr. Lysaght knew, this statement contradicted Petitioner's intended testimony, placing him in the position of contradicting his attorney or testifying falsely. Chruby Aff. ¶ 15 (App. 29a). As set forth *supra* at 18, counsel's concession of guilt without his client's consent was deficient. Counsel's defective performance prevented Petitioner's testimony from being heard by the jury. Equally to the point, Mr. Lysaght's statement that his client was guilty of crimes could not but be prejudicial to Petitioner, especially since it was not followed by any evidence or testimony from him that placed the admission in context or demonstrated why the statement that Petitioner was guilty of one crime showed that he was innocent of murder. Cf. *United States* v. *Tavares*, 100 F.3d 995, 998 (D.C. Cir. 1996) (when defendant concedes that a crime has occurred, but disputes his involvement in that crime, his testimony "'must be considered of prime importance'") (quoting *United States* v. *Walker*, 772 F.2d 1172, 1179 (5th Cir. 1985)).

Third, prior to trial, Mr. Lysaght confirmed unequivocally to Petitioner, his family, and co-counsel that he had obtained critical evidence and witnesses that would support Petitioner's testimony. After the delayed opening, Petitioner learned that Mr. Lysaght had utterly failed to prepare the timeline defense and failed to secure the necessary evidence and witnesses. Specifically, Mr. Lysaght said that he had obtained: (a) phone records demonstrating that Petitioner could not have made the phone call from his motel room to the home of the victim; and (b) records that would demonstrate that Petitioner did not have a belt of the sort alleged to link him to the murder. At some later point prior to the trial, counsel assured Petitioner's family that although he had not in fact obtained the relevant records concerning the

belt, he had filed a *motion in limine* to suppress the belt and that the motion had been granted. Accordino Aff. ¶ 5 (App. 37a). Once the defense portion of the case commenced, however, it became clear that counsel had prepared *no defense*. Not a single witness, including David Nieves, had been subpoenaed nor had a single piece of evidence been obtained. Chruby Aff. ¶ 21 (App. 29a-30a); Coopers Aff. ¶ 10 (App. 33a); Accordino Aff. ¶ 7 (App. 38a). Mr. Lysaght did not in fact obtain the phone records at issue. He had neither obtained the relevant records concerning the belt nor filed a *motion in limine* to suppress its admission. Accordino Aff. ¶ 5 (App. 37a). Had Mr. Lysaght obtained and presented this evidence, *i.e.*, in combination with Petitioner's testimony, would have left the jury with reasonable doubt about Petitioner's commission of the murder. Indeed, Mr. Lysaght's performance left Petitioner with the choice of going forward with his incompetent representation or of proceeding pro se (given the judge's denial of a continuance). This is no choice at all. Arguably, it was inherently prejudical to require Petitioner to proceed with this plainly incompetent counsel. Cf. *Crandell* v. *Bunnell*, 144 F.3d 1213, 1216 (9th Cir. 1998) (holding that it was unconstitutional to require a defendant to "be forced to choose between incompetent counsel and no counsel at all," especially in a capital case).

In sum, in assessing whether counsel's defective performance prejudiced Petitioner, the court of appeals erroneously considered only the proceedings that actually occurred, rather than the proceeding that would have occurred if counsel's performance had been competent. In that regard, it is critical to recall that the Commonwealth's case against Petitioner was wholly circumstantial. There was no evidence at the crime scene linking Petitioner to the crime, no fingerprints, hairs, or fibers – an absence rendered significant given the violent struggle that occurred between the victim and her attacker. Critically, moreover, Petitioner's testimony would have explained both his whereabouts that day and the

manner in which he came into possession of the victim's vehicle. See Chruby Aff. ¶ 28 (App. 31a) ("I did not murder Ruth Fergus. . . . I was in possession of the Fergus vehicle but I only took it when I found it far from the victims home."). It was counsel's defective performance that resulted in the absence from the trial of this testimony, as well as with other evidence calling into question the links between Petitioner and the murder.

This is not simply a matter of omission, however. In addition to the absence of this evidence, the jury heard Petitioner's counsel both promise that Petitioner would testify and concede that Petitioner committed a crime. Cf. *Ouber*, 293 F.3d at 34 (counsel's broken promise also undermined his standing with the jury, further diminishing defendant's chances of success). It was plainly unreasonable for the lower courts to conclude that these omissions and grievous errors did not prejudice Petitioner. "[T]here is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695.

II. THE COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER THE LOWER COURTS HAVE UNREASONABLY EXTENDED *MINNESOTA* v. *MURPHY* AND AUTHORIZED DELIBERATE CIRCUMVENTION OF *MIRANDA*.

In AEDPA review, a state court decision is an "'unreasonable application'" of this Court's precedent if the state court "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply." *Williams*, 529 U.S. at 407 (O'Connor, J.). In this case, the court of appeals unreasonably extended *Minnesota* v. *Murphy*, 465 U.S. 420 (1984), to situations in which the parole officer acts as a front for the police so that they can conduct a custodial interrogation without giving a parolee *Miranda* warnings.

In *Minnesota* v. *Murphy*, a parole officer, *acting on her own*, questioned a parolee about possible criminal activity during a routine probation interview. This Court held that in these circumstances, a parole officer is not required to give a parolee *Miranda* warnings before such questioning. Specifically, the Court reasoned that the parolee was not in custody within the meaning of *Miranda* because, *inter alia*, he was familiar with the setting and thus not subject to "psychological intimidation" and because he was in fact free to leave at the end of the probation meeting.

Here, relying on *Minnesota* v. *Murphy*, the court of appeals held that police who wish to interrogate a suspect with an outstanding arrest warrant may freely circumvent any parolee's right to the *Miranda* warnings. They need only recruit the parole officer, provide him with the questions necessary to conduct the interrogation, and wait nearby to make the arrest *after* the results of the un-*Mirandized* interrogation are obtained. This holding unreasonably extends *Minnesota* v. *Murphy* far beyond its intended scope, encouraging the police to use a suspect's parole officer as a stalking horse and to delay formal arrest until the un-*Mirandized* questioning can take place. When this Court decided *Minnesota* v. *Murphy*, plainly it did not intend to encourage this deliberate circumvention of the *Miranda* rights of parolees.

First, and most clearly, *Minnesota* v. *Murphy* reserves the question whether a parole officer must advise a parolee of his or her *Miranda* rights when the parole officer has in fact been engaged as an agent of the police to participate in an ongoing criminal investigation:

> A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would

> incriminate him in a pending or later criminal prosecution. [465 U.S. at 435.]

Indeed in *Howard* v. *Moore*, 131 F.3d 399, 412 n.13 (4th Cir. 1997), the Fourth Circuit explained that "[i]t is unclear from the Court's analysis [in *Minnesota* v. *Murphy*] whether it considered the probation officer, whose admitted primary purpose for arranging the interview was to obtain incriminating statements from her probationer, to be acting as an agent of the police." Put differently, this Court has never held – as the Third Circuit did here – that a probation officer may act as a stalking horse or agent for the police and interrogate a parolee about to be arrested so that the police can dispense with any need to give *Miranda* warnings.

It is undisputed that in sharp contrast to the usual role of a parole officer, Officer Fox, in questioning Petitioner, was acting as an agent for the police. See *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357, 368 (1998) ("in contrast to police officers, [parole officers] are not 'engaged in the often competitive enterprise of ferreting out crime'"). Moreover, courts of appeals that have addressed the question agree that probation officers performing their routine duties are not engaged in custodial interrogation requiring *Miranda* warnings, but suggest that the result would be different where, as here, the probation officer is acting as the agent of police. See, *e.g.*, *Howard* v. *Moore*, 131 F.3d at 412 n.13 (holding that "absent evidence that [the parole officer] stepped outside his neutral role as a federal probation officer, we question the dissent's assumption that [the parole officer] acted as an agent of police"); *Williams* v. *Chrans*, 945 F.2d 926, 951 (7th Cir. 1991) (explaining that a parole officer is generally "'a neutral information gatherer for the court rather than [an agent of] the police or prosecution'") (quoting *United States* v. *Cortes*, 922 F.2d 123, 127 (2d Cir. 1990)); *United States* v. *Rogers*, 921 F.2d 975, 979 (10th Cir. 1990) (concluding that "[t]he purpose of the presentence report . . . is neither prosecutorial nor punitive. . . . [as t]he probation

officer acts as an agent of the court for the purpose of gathering and classifying information"); *United States* v. *Jackson*, 886 F.2d 838, 842 n.4 (7th Cir. 1989) ("we do not believe that a federal probation officer acts on behalf of the prosecution").

In this case, however, Parole Officer Fox was acting solely at the behest of the police. Specifically, at their request, he interrogated Petitioner about matters related to an ongoing murder investigation in which Petitioner was a suspect, using questions that the police directed him to ask. Officer Fox was also aware that the police were using a warrant in a $17 bad-check case – a warrant that had existed all through the period of Petitioner's recent incarceration – as a ruse or tool to investigate a wholly unrelated murder. While he was interrogating Petitioner, Officer Fox thus knew that the police had an outstanding warrant for his arrest; that they were on the premises to arrest him after their agent (Officer Fox) interrogated him; and therefore that Petitioner was in fact in custody, unable freely to leave. Aware of their obligation not to interrogate Petitioner without giving him his *Miranda* rights, the police deliberately recruited an agent to act and delayed their arrest in order to circumvent *Miranda*'s requirements.

It is plainly unreasonable to extend *Minnesota* v. *Murphy* to situations such as that presented here, where the police intentionally violate *Miranda* to procure evidence from a suspect in a murder investigation. In a directly analogous context, the law is clear that an otherwise permissible probation search may be held invalid if it is merely a cover for illegal police activity. A probation officer's "exercise of th[e] authority [for a warrantless search] should not be upheld when it appears that the probation or parole officer 'was nothing more than the agent, tool, or device of' the police." Cf. 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10(e), at 794 (3d ed. 1996) (quoting *United States* v. *Hallman*, 365 F.2d 289, 292 (3d Cir.

1966)). Similarly here, an otherwise permissible interview by a probation officer is unlawful if it is merely a cover for an illegal police interrogation. In the interrogation context, too, the probation officer should not be permitted to act as a cat's paw so that the police can evade the Constitution's requirements.[4]

One of the purposes of *Miranda* is "to ensure that the police do not coerce or trick captive suspects into confessing." *Berkemer* v. *McCarty*, 468 U.S. 420, 433 (1984) (emphasis omitted) (footnote omitted) (citing *Rhode Island* v. *Innis*, 446

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[4] In the alternative, under this Court's decisions, it was unreasonable for the lower courts to conclude that Petitioner was not in custody for purposes of the application of *Miranda*. Under clearly established Supreme Court law, the issue is whether a reasonable person in Petitioner's position would have understood that he was free to leave. *See Stansbury* v. *California*, 511 U.S. 318, 324 (1994) (per curiam). Here, although it is undisputed that Petitioner was in fact *not* free to leave, the lower courts held that a reasonable person in Petitioner's position would have believed that he was free to go. The evidence presented makes clear that this conclusion was unreasonable as a matter of law. This was not a routine meeting between a parole officer and a parolee. Petitioner was required to attend the meeting, and the parole officer certainly never informed him that he was free to leave or that he had a right to remain silent. Petitioner was aware that there were police in the building and that they had been speaking with Officer Fox; moreover, prior to the meeting with Officer Fox, he had been frisked and photographed (not usual practices for interviews with a parole officer). *See supra* at 4. In addition, Petitioner was informed during the interview that there was an outstanding warrant for his arrest on a bad check charge. Finally, Petitioner was arrested promptly at the end of the meeting. These factors, in combination, show that it was unreasonable for the lower courts to conclude that, as the parole interview developed, Petitioner believed that he was free to go. Any reasonable person in Petitioner's situation would have understood based on the police presence and Officer Fox's questions that he was the focus of an investigation and effectively in custody. *Cf. Berkemer* v. *McCarty*, 468 U.S. 420, 440 (1984) (although a traffic stop in not inherently a custodial situation, "[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*").

U.S. 291, 299, 301 (1980), *Miranda*, 384 U.S. at 445-58). The ramifications of the decision below are deeply disturbing, because it permits a proliferation of police department policies encouraging police officers to conduct interrogations of paroled suspects through parole officers, circumventing the need to provide *Miranda* warnings. The petition for certiorari should be granted to address the important question raised about the legality of this tactic.[5]

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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March 19, 2002

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[5] The court of appeals held that even if Petitioner's statements should have been suppressed as the fruit of a *Miranda* violation, *compare Dickerson* v. *United States*, 530 U.S. 428, 444 (2000), *United States* v. *Patane*, 304 F.3d 1013, 1019 (10th Cir. 2002), *and United States* v. *Faulkingham*, 295 F.3d 85, 90-94 (1st Cir. 2002), *with United States* v. *Sterling*, 283 F.3d 216, 218-19 (4th Cir. 2002), the police would nonetheless have discovered the car key and parking ticket and hence the victim's car and associated evidence. This turns on whether the police would have arrested Petitioner once he answered questions following *Miranda* warnings, a question that the lower courts could not have decided. This issue should be the subject of a new trial if the court of appeals is reversed and the matter is remanded.

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2913

WALTER A. CHRUBY,

Appellant

v.

FRANK D. GILLIS, SUPERINTENDENT, S.C.I, COAL TOWNSHIP, ATTORNEY GENERAL OF PENNSYLVANIA

Argued Oct. 31, 2002
Decided Nov. 29, 2002

On Appeal from the United States District Court for the Middle District of Pennsylvania. (D.C. No. 00-cv-01247). District Judge: The Honorable William J. Nealon.

Before: SLOVITER and FUENTES, Circuit Judges and FULLAM,* District Judge.

OPINION OF THE COURT

FUENTES, Circuit Judge.

Petitioner Walter A. Chruby appeals the District Court's denial of his petition for writ of habeas corpus. In his petition, Chruby challenges the constitutionality of his state court conviction of first-degree murder and related crimes. Petitioner asserts that the pre-arrest statements he made to his probation officer and evidence discovered following his arrest

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* The Honorable John P. Fullam, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

should have been suppressed because his probation officer did not advise him of his *Miranda* rights prior to questioning him.[1] Additionally, petitioner brings a claim for ineffective assistance of counsel. Because we agree with the District Court that *Miranda* rights did not attach and because petitioner was not prejudiced by his trial counsel's performance, we affirm.

I. *Facts and Procedural Background*

The facts and circumstances of this case stem from the murder of Ruth Fergus on September 3, 1995. After a jury trial, defendant Chruby was convicted of first-degree murder and related theft offenses. The issues on appeal concern the initial interview Chruby had with a probation officer just after the Fergus murder and to comments made by Chruby's defense attorney during trial.

A. *Facts relating to Appellants' assertion that Probation Officer Fox should have Mirandized him prior to interviewing him*

Charles Fox was employed as a probation officer assigned to the Harrisburg, Pennsylvania office. In mid-August 1995, he was assigned to supervise Chruby, who was soon to be released from federal prison. As per Fox's instruction, Chruby called Fox to let him know he was being released from prison on August 28, 1995.

On August 31, 1995, the day before Chruby was to report to Fox for his initial interview, Officer Sleeth of the State College Police called Fox and told him that he had caught Chruby driving his ex-wife's car without permission, that the ex-wife had declined to prosecute him, that Chruby made threats of suicide and that he was taken to the hospital and released later that day. On the day of the initial interview, Chruby called Fox and told him he could not appear because

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[1] *See Miranda v. Arizona,* 384 U.S. 436 (1966)

he had transportation problems. Fox rescheduled the appointment for September 5. On September 5 Chruby called to again cancel his interview because he still had no transportation. Fox rescheduled the appointment for 3:30 p.m. on September 7.

However, on September 6, Fox got a call from John Shoemaker, another State College Police Officer, who told him that the police were looking for Chruby and had a warrant for his arrest on a bad check charge. Shoemaker also said they wanted a photograph of Chruby. Fox told Shoemaker that he was scheduled to meet with Chruby the next day.

On September 7, Shoemaker and Detective Dann, both from State College Police Department, and Detective Inschweiler of Dauphin County came to Fox's office. They told him that Chruby was a suspect in a homicide investigation but that they did not have enough evidence to charge him. At the probation office it was determined that the officers would wait in a separate office during Fox's interview with Chruby and thereafter Shoemaker would arrest Chruby on the bad check warrant. According to Fox, the police asked him to interrogate Chruby about matters related to their criminal investigation, such as where he had been presently staying, where he had been for the past couple of days, where the car was, and how he got to the appointment in Harrisburg from State College.

When Chruby arrived, Fox met him in the lobby and escorted him back to his office. When Fox asked him where he had parked, Chruby responded that he had parked in the Walnut Street Garage across from the federal building. Fox asked Chruby how he got to the probation office and Chruby responded that a friend named "Dave" whose last name he did not know drove him in. Fox started the standard installation interview and reviewed with Chruby the rules and conditions that would apply to his probation. He asked Chruby if he had any pending cases against him and, after

Chruby responded in the negative, Fox told him about the bad check charge. After the interview, Fox took Chruby to the officers, who were now waiting in the lobby.

Officer Shoemaker arrested Chruby on the bad check warrant. Officer Dann patted Chruby down for weapons and Officer Shoemaker went into Fox's office, where he learned from Fox that Chruby initially said he had driven to the interview and parked in the Walnut Street Garage, but later said he had gotten a ride from someone named Dave. Thereafter, Dann gave Shoemaker a Ford car key and a Walnut Street Garage ticket he had removed from Chruby. Shoemaker asked Chruby where the car was parked and Chruby responded that it was not his car and that he had gotten a ride from Dave. The police located the automobile in the Walnut Street Garage and determined that it belonged to the murder victim, Ruth Fergus. The key in Chruby's pocket fit the ignition. Found hidden in a blood stained glove in the undercarriage of the car was Fergus' credit card. On October 4, 1995, an eight-count criminal information was filed against Chruby for the murder of Ruth Fergus. His trial commenced on June 23, 1997.

B. *Facts relating to Appellant's assertion that he received ineffective assistance of counsel at trial*

After promising the jury four times, in a delayed opening statement, that Chruby would testify, defense counsel did not call Chruby to the stand. According to Chruby, trial counsel warned him that he would get the needle if he testified. During the trial, defense counsel also told the jury that Chruby had used the victim's credit card and had stolen her car. Chruby claims he was prejudiced because he intended to take the stand and tell the jury that he had not committed these acts. The trial judge instructed the jury not to draw any inference of guilt from Chruby's exercise of his constitutional right to elect to remain silent and not testify on his own behalf.

Following the jury trial and verdict, the jury sentenced Chruby to life imprisonment on the murder charge. The trial judge added concurrent and consecutive sentences for the related theft charges. Chruby brought post-sentence motions in which he asserted that (1) the trial court made various errors; (2) the Commonwealth was guilty of prosecutorial misconduct; and (3) his trial counsel was ineffective. After unsuccessfully appealing his conviction to the Pennsylvania Superior Court and the Pennsylvania Supreme Court, appellant filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania on July 13, 2000. He alleged that he is in custody pursuant to a judgment of a state court in violation of the Constitution. The District Court denied the petition and found no basis for a certificate of appealability. This Court granted a certificate of appealability.

II. *Jurisdiction and Standard of Review*

The District Court exercised jurisdiction over this matter under 28 U.S.C. § 2254. We have appellate jurisdiction under 28 U.S.C. § 1291.

In habeas corpus appeals, this Court conducts a *de novo* review of the district court's rulings. *See, e.g., Elder v. Holloway,* 510 U.S. 510, 516 (1994). The Court is to decide what is clearly established law as determined by the Supreme Court, *see Williams v. Taylor,* 529 U.S. 362, 390 (2000), then determine whether the state court's decision was "contrary to" or "an unreasonable application of" that law. *Id.* at 404-05 (citing 28 U.S.C. § 2254(d)(1)). Each of these clauses has an independent meaning. *See id.* at 405.

A state court decision can be "contrary to" the Supreme Court's clearly established precedent in one of two ways: (1) if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases, *see id.* at 405; or (2) "if the state court confronts a set of facts that are

materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Id.* at 406.

A state-court decision involves an "unreasonable application" of Supreme Court precedent if (1) the state court identifies the correct legal rule from controlling Supreme Court cases but unreasonably applies it to the facts of [sic] presented by the state prisoner; or (2) if the state court either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or refuses to extend that principle to a new context where it should apply. *See id.* at 407.

The state court's determinations of factual issues are presumed correct. *See* 28 U.S.C. § 2254(e)(1). The petitioner bears the "burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.*

III. *Discussion*

Relying on *Minnesota v. Murphy,* 465 U.S. 420 (1984), Chruby asserts that Probation Officer Fox acted as an agent of the police and thus his questioning gave rise to a Fifth Amendment privilege. In *Minnesota v. Murphy,* the Supreme Court held that a probationer must timely assert his Fifth Amendment privilege when questioned by his probation officer if the probationer's privilege is to be preserved. The Court recognized three exceptions to that general rule: when the incriminating statement was "obtained from suspects in police custody[,]" *id.* at 429; "where the assertion of the privilege is penalized so as to 'foreclos[e] a free choice to remain silent, and . . . compe[l] . . . incriminating testimony[,]'" *id.* at 434 (citation omitted); and "in the context of the federal occupational and excise taxes on gamblers[,]" *id.* at 439.

In arriving at its conclusion that Murphy was not in custody and hence did not fall within the first exception, the Supreme Court reasoned that: (1) the fact that he was under legal compulsion to attend the meeting and to answer his probation officer's questions truthfully did not excuse his failure to exercise his Fifth Amendment privilege even though the probation officer was anticipating incriminating answers; *see id.* at 431; and that (2) due to the nature of probation, Murphy should have expected to be questioned on a wide range of topics related to his past criminality and therefore he was not deprived of a right to seek counsel before attending the meeting. *See id.* at 432.

In *Murphy,* the Court emphasized that it has "consistently held" that the "extraordinary safeguard" of exclusion of incriminating statements "does not apply outside the context of the inherently coercive custodial interrogation for which it was designed." *Id.* at 430 (citations omitted). *See also Illinois v. Perkins,* 496 U.S. 292, 296 (1990) (statements obtained by an undercover agent posing as a prisoner held admissible because of the absence of a "police-dominated atmosphere" and "compulsion").

Whether a suspect is in custody depends on whether, under the totality of the circumstances, a reasonable person in his position would feel free to leave. *See Thompson v. Keohane,* 516 U.S. 99, 112 (1995). Chruby argues that he falls within the custodial interrogation exception, but the record of the evidentiary hearing on Chruby's motion to suppress is devoid of any evidence showing that he felt like he was not free to leave. The record presented at the evidentiary hearing did not show that Chruby was aware of the police presence outside of Fox's office before Fox told him he would be arrested in the bad check warrant and introduced him to the officers. Moreover, even in light of Chruby's testimony during a

hearing on postsentence motions, we conclude that a reasonable person in his circumstances would not feel that he was not free to leave.

Chruby asserts that he was frisked when he entered the federal building even though he had not been frisked other times he had entered the building and that he was frisked as soon as he entered Fox's office. After searching him, Fox told him he was going to take his picture. Even if these events marked departures from Chruby's previous experience, they do not give rise to a reasonable sense of being unable to leave. Additionally, Chruby asserts that he saw officers sitting directly across the hallway from where he was sitting and thought they were there to talk to him about the car he had stolen.

It was not reasonable for Chruby to have believed that he was not free to leave after seeing the officers because (1) Fox's questioning as to how he had gotten to the meeting should have come as no surprise because he had told Fox previously, when calling to reset the date for his installation interview, that he had been experiencing transportation problems; and (2) he did not know at the time Fox questioned him that the police were planning to arrest him on a bad check warrant. Therefore, even if he saw the officers at the federal building, at the time that he was questioned, he had no reasonable basis for thinking they were there to arrest him.

Chruby does not contend that he falls within the other two exceptions discussed in *Murphy* that requires prior *Miranda* warnings. Accordingly, the District Court correctly concluded that it was not unreasonable for the state superior court to conclude that Chruby, like the defendant in *Minnesota v. Murphy,* was not entitled to be *Mirandized.*

Moreover, even were the Court to accept Chruby's argument that he was in custody and therefore that his statements to Fox should have been excluded, he cannot

seriously dispute that the officers would have discovered the car key and thereby the incriminating evidence in the car. This is because, when an officer makes an arrest of a suspect based on probable cause, "a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *United States v. Robinson,* 414 U.S. 218, 235 (1973).

Chruby's ineffective assistance of counsel claim also fails to warrant habeas relief. Chruby asserts that he did not testify because his trial counsel made an unauthorized admission to the jury that he had used the victim's credit card and had stolen her car and therefore, had he taken the stand, he would have contradicted his attorney's statement. Chruby asserts that he wanted to testify he had never used the victim's credit card and had used her car only after he found it far from her home. Chruby complains that he decided not to testify only after trial counsel told him that he would get the needle if he took the stand.

In *Strickland v. Washington,* 466 U.S. 668 (1984), the Supreme Court explained that the inquiry to be asked in assessing an ineffective assistance of counsel claim is whether "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance . . . . [T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. The troubling aspect of trial counsel's performance is that he delivered an opening statement after the close of the prosecution's case. At that point he had heard the evidence against his client and was in a good position to determine whether or not to call him to the stand. Moreover, if he was

unsure at that point whether Chruby should testify, he probably should not have promised the jury that Chruby would take the stand in his defense.

Assuming that Chruby has shown that counsel's errors were "professionally unreasonable," *id.* at 691, he nonetheless fails to show that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. The Supreme Court teaches that a "reasonable probability" in this context "is a probability sufficient to undermine confidence in the outcome." *Id.* We therefore turn to the evidence presented by the Commonwealth during Chruby's criminal trial in order to ascertain whether, absent the errors asserted, there is a reasonable probability that the jury would not have convicted Chruby.

The Commonwealth presented a strong case against Chruby, which included evidence of the facts that follow. The day after their investigation of Fergus' homicide began, the police received clothing and some store tags and receipts all contained within an "American Outfitters" shopping bag that had been discovered by an employee of a trash pick-up service in a dumpster across town. All of the items appeared to be stained with blood. The district manager for American Outfitters reviewed the receipt, which showed that the clothing was paid for with the victim's credit card, which was missing from her wallet, and that the purchase had been made fifty minutes after the last time that anyone had heard from the victim. The clothing was sold to an individual matching Chruby's general description and placed in a shopping bag identical to the one found in the dumpster. The next day the police discovered that Chruby had been an inmate at the federal prison in Butner, North Carolina and that inmates at this facility were provided with green army-type belts identical to the one found in the bag in the dumpster. The police investigation also revealed that a person matching

Chruby's description had been taken to the Nittany Mall where items identical to other bloody clothing found in the dumpster were purchased. After the outfit matching the bloody dumpster ensemble was purchased, a taxi picked a man up at the mall and brought him to the motel where Chruby had been staying. The motel clerk remembered seeing Chruby return to his room that evening with a bag and also remembered seeing Chruby wearing a shirt identical to the bloody one found in the dumpster. According to motel records, a call was placed from Chruby's room to the victim's residence on September 1, 1995.

At trial it was also disclosed that Chruby and the victim had met in the spring of 1995, before Chruby went to prison. The victim and Chruby had met at a fund-raiser dinner for the Centre County Women's Resource Center, where they were among six other guests. The victim realized that the topics of conversation were not of interest to Chruby so she directed his attention to something they had in common—Chruby's acquaintance with her son, Chuck. Chuck Fergus is an author who writes about hunting, nature, and the outdoors. Chruby met Chuck when Chruby was employed as a hunting guide at a hunting preserve in Centre County and the two hunted together. The police thought that Chruby may have formed the impression that the Fergus family was well off because Chuck Fergus was a well-known author and the victim was a prominent community activist.

The Commonwealth presented the evidence summarized above and other evidence at trial. Given the strength of the Commonwealth's case, we cannot conclude that, absent trial counsel's errors, the jury would have had a reasonable doubt as to Chruby's guilt.

IV. *Conclusion*

After hearing oral arguments and carefully considering the arguments discussed above and all other arguments advanced by the petitioner in support of his assertion that the District Court erred in denying his petition for writ of habeas corpus, we affirm the District Court's decision.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

By the Court,

/s/ Julio M. Fuentes
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

[Filed Jun 11, 2001]

CIVIL NO. 3:CV-00-1247
(JUDGE NEALON)

WALTER ALAN CHRUBY,

Defendant,

v.

FRANK D. GILLIS, *et al.*,

Respondents.

MEMORANDUM

Background

The above-captioned petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 was initiated by Walter A. Chruby, an inmate presently confined at the State Correctional Institution, Coal Township, Pennsylvania. Along with his petition, Chruby submitted the requisite five ($5.00) dollar filing fee for this action. Chruby is represented by counsel. This matter is now ripe for consideration. For the reasons that follow, the petition will be denied.

Chruby was convicted on June 25, 1997, of First Degree Murder as well as Robbery, Burglary, Criminal Trespass, Theft, and a credit card violation following a jury trial in the Centre County, Pennsylvania Court of Common Pleas for which he was sentenced to life imprisonment.[1]

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[1] The life sentence was for first degree murder. Chruby also received additional time on the remaining counts which run concurrently to his life

Chruby filed his notice of appeal on December 29, 1997 with the Superior Court of Pennsylvania, presenting four issues: (1) whether trial counsel was ineffective in failing to investigate an alibi defense; (2) whether trial counsel's statements to the jury in his opening that Chruby would testify and then the subsequent failure of Chruby to testify amounts to ineffective assistance of counsel; (3) whether Chruby's parole officer acted as an agent of the state and, thus, was required to give Chruby his *Miranda* rights prior to questioning him regarding the murder;[2] and (4) whether the Commonwealth committed prosecutorial misconduct in stating that a stain on defendant's sock was the blood of the victim, who was crying out from the grave for the jury to find him guilty. On March 9, 1999, the Superior Court denied Chruby's appeal. *See Commonwealth v. Chruby*, 737 A.2d 1270 (Pa.Super. 1999). On April 4, 1999, he filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania. An Amended Petition was filed on April 7, 1999. This petition was denied on July 15, 1999. *See Commonwealth v. Chruby*, 740 A.2d 1140 (1999). Chruby has not sought collateral relief via a petition under Pennsylvania's Post Conviction Relief Act (PCRA). [See 42 Pa. Cons. Stat. Ann § 9541 et seq.]

On July 13, 2000, Chruby filed the instant petition in which he challenges only the statements he made to his parole officer and counsel's statements that he would testify at trail when, in fact, he did not. While Respondents acknowledge that the *Miranda* issue is exhausted with respect to Chruby's statements to his parole officer, they contend that the

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sentence. Chruby's petition states he was sentenced to an additional 44-88 years on the remaining counts to run concurrently with his life sentence. The repondents state that the additional sentence resulted in an aggregate sentence of 22-44 years to run concurrently to the life sentence. The discrepancy in interpreting his sentence is not before this Courtt.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

ineffective assistance claim has not been "fairly presented" to the state courts, and thus the petition is mixed and should be dismissed unless the petitioner abandons the unexhausted claim. *Rose v. Lundy*, 445 U.S. 509 (1982). *See* Document 19, pg(s) 3-8. After reviewing the record, it is concluded that the two claims have been exhausted.

Discussion

I. Exhaustion

As a general rule, a state prisoner must exhaust available state court remedies before seeking habeas relief in federal court. 28 U.S.C. §§ 2254(b),(c); *Rose* at 515-20; *Toulson v. Beyer*, 987 F.2d 984, 986 (3d Cir. 1993); *Gibson v. Scheidemantel*, 805 F.2d 135, 138 (3d Cir. 1986). "Unless it would be patently futile to do so [state prisoners] must seek relief in state court before filing a federal habeas petition . . . ." *Santana v. Fenton*, 685 F.2d 71, 77 (3d Cir. 1982), *cert. denied*, 459 U.S. 1115 (1983). The exhaustion requirement "is not a mere formality. It serves the interests of comity between the federal and state systems by allowing the state an initial opportunity to determine and correct any violations of a prisoner's federal rights." *Gibson*, 805 F.2d at 138.

A habeas corpus Defendant bears the burden of demonstrating that he has satisfied the exhaustion requirement. *Gonce v. Redman*, 780 F.2d 333, 336 (3d Cir. 1985). Exhaustion is not complete unless the trial court, a state intermediate appellate court (if applicable), and the highest state court, here the Supreme Court of Pennsylvania, have been presented with the substance of Defendant's claims. *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995); *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1230 (3d Cir. 1992). The threshold inquiry in the exhaustion analysis is whether the claims asserted in the habeas corpus petition have been "fairly presented" to the state court. *Picard v. Connor*, 404 U.S. 270, 275 (1971). In *Duncan*, 513 U.S. at 366, which

concerned exhaustion of an evidentiary issue, the Supreme Court relied, *inter alia,* on *Picard* and held: "If a habeas Defendant wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment he must say so, not only in federal court, but in state court."

One of the avenues for relief in the Pennsylvania legal system is collateral relief under the PCRA "which permits motions for post-conviction collateral relief for allegations of error, including ineffective assistance of counsel, unlawfully induced guilty pleas, improper obstruction of rights to appeal by Commonwealth officials, and violation of constitutional provisions." *Hankins v. Fulcomer,* 941 F.2d 246, 251 (3d Cir. 1991). The exhaustion requirement is satisfied if the Defendant's claims are either presented to the state courts directly on appeal from the judgment of conviction and sentence or through a collateral proceeding under the PCRA. It is not necessary, however, to present federal claims to state courts both on direct appeal and in a PCRA proceeding. *Evans*, 959 F.2d at 1230-31; *Swanger v. Zimmerman*, 750 F.2d 291, 295 (3d Cir. 1984). Therefore, Chruby is not required to file a petition under Pennsylvania's PCRA.

Respondent contends that Defendant has not exhausted his allegation of ineffectiveness of counsel because it was not fairly presented to the state courts. Although worded differently from the issue presented to the Superior Court, the Superior Court did address the same ineffective assistance of counsel claim and[3] concluded the claim of ineffective

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[3] The issue presented to the Superior Court stated, "Whether trial counsel's statements to the jury in his opening that Appellant would testify and tell his story and then the subsequent failure of Appellant to testify amounts to ineffective assistance of counsel." *See* Document 22, pg 2. In the instant petition, Chruby raises as ground two, "denial of effective assistance of counsel." Chruby provided the following supporting facts to ground two: trial counsel promised in a delayed

assistance of counsel regarding opening statements did not have merit.[4]

Furthermore, the ineffective assistance of counsel claim before this court was squarely raised in Defendant's brief to the Superior Court. *See* Document 22, pg(s) 9-11. The exhaustion requirement is fulfilled on that basis as well. *See Smith v. Digmon*, 434 U.S. 332 (1978) ("(W)hether the exhaustion requirement . . . has been satisfied cannot turn upon whether the state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in Defendant's brief in the state court.")

Federal habeas corpus statute requires only that state prisoners give state courts *fair* opportunity to act on their claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). *See Castille v. Peoples*, 489 U.S. 346, 349-350 (1989); *Picard v. Connor*, 404 U.S. at 275-276. Because Chruby also raised this ground in his Petition for Allowance of Appeal to the

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opening statement that Walter Chruby would testify while subsequently not only failing to call Mr. Chruby to the stand but also interfering with his right to testify. Trial counsel misled Mr. Chruby as well as co-counsel regarding the nature of the defense prepared and also coerced Mr. Chruby into not testifying through the use of outrageous threats. *See* Document 1, pg 5. Within the supporting Brief which accompanied the instant Petition, Chruby's counsel incorporated these factors within the Statement of Question. *See* Document 13, Table of Contents. Chruby's counsel clearly included these factors because it was part of the Superior Court's analysis in determining that the ineffective assistance of counsel claim regarding opening statements had no merit. In regards to this part of the analysis, the Superior Court, although not cited in its opinion, applied the standard set forth in *Commonwealth v. Neal*, 618 A.2d 438 (Pa. Super. 1992), which sets out the standard in Pennsylvania for sustaining a claim that counsel was ineffective for failing to call the appellant to the stand. *See* Document 23, pg 4. Defendant is not raising a new claim.

[4] As part of its analysis, the Superior Court discussed whether counsel interfered with Chruby's right to testify and whether Chruby was prejudiced by his counsel's action. *See* Document 23, pg(s) 4-5.

Pennsylvania Supreme Court, *see* Document 24, pg 3, Chruby met his exhaustion requirements with the Pennsylvania Supreme Court. *O'Sullivan*, 526 U.S. at 847 (In order to satisfy exhaustion requirement, prisoner was required to present his claims to state Supreme Court even though review by state Supreme Court was discretionary). Based on a review of the record, both claims before this court have been exhausted and are now ripe for consideration.

II. Standard of Review

Title 28 U.S.C. §2254(d) provides that federal habeas relief shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim involved an unreasonable determination of the facts in light of the evidence presented or "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United Sates." 28 U.S.C. §2254(d)(1). Recently, the United States Court of Appeals for the Third Circuit addressed the issue of what analysis district courts should employ in addressing §2254 petitions under the Antiterrorism and Effective Death Penalty Act (AEDPA). *Matteo v. Superintendent, SCI Albion,* 171 F.3d 877, 879 (3d Cir. 1999) (petition for certiorari filed, 67 USLW 3008 (June 22, 1999)). The court held that the AEDPA requires a two part inquiry; it must first be determined that the challenged state court decision was contrary to clearly established federal law as determined by the United States Supreme Court. Second, if it was not, the reviewing federal court "must evaluate whether the state court judgment rests upon an objectively unreasonable application of clearly established Supreme Court jurisprudence." *Id.* Consequently, a Defendant must establish that Supreme Court precedent requires a contrary outcome to that reached in state court. *See id.* at 888.

III. Parole officer acting as agent of the police

Chruby contends that his parole officer was acting as an agent of the police and, thus, was required to provide *Miranda* warnings prior to his being questioned. The relief sought is suppression of the pre-arrest statements Chruby made to his parole officer as well as suppression of post-arrest evidence based on the fruits of the poisonous tree doctrine.

Chruby's brief in support of his instant petition states that Chruby had a scheduled, routine, initial interview with his parole officer. Prior to the interview, the State College police met with the parole officer regarding a murder investigation in which Chruby was a potential suspect. Chruby also had an outstanding arrest warrant for a bad check charge. The police intended to arrest Chruby based on that warrant after the parole officer questioned Chruby regarding how he had traveled to Harrisburg, where he was staying, where his vehicle was parked and where he had been during the previous days. *See* Document 13, pg(s) 6-12.

Chruby arrived for his interview with the parole officer and, in response to his parole officer's question regarding where he had parked, Chruby stated he parked in the Walnut Street Garage. When asked how he got to the office, Chruby stated that a friend named Dave drove him down. In response to additional questions regarding Dave, Chruby explained that he met Dave in AA and that Dave had gone to an AA/NA meeting over on the west shore across from Harrisburg. When the parole officer questioned him again about parking in the Walnut Street Garage because his initial explanation was not plausible, Chruby admitted to not having parked in the garage. After discussing supervised release and his pending arrest warrant, Chruby departed from the parole officer's office and was arrested by the police. *See* Document 13, pg(s) 6-12.

Chruby was placed in handcuffs and a patdown was conducted. The primary officer then spoke with the parole officer regarding the interview. At the same time the primary officer was meeting with the parole officer, a second officer completed the processing of Chruby. A car key and ticket for the Walnut Street Garage was removed by this officer from Chruby's person. When asked where he parked his car, Chruby denied ownership of the car and maintained that he had been driven there by his friend. Chruby still had not been given his *Miranda* rights. The decedent's car was located in the Walnut Street Garage. *See* Document 13, pg(s) 10-12. As the undercarriage of the vehicle was being examined, a detective discovered a pair of brown gloves lying on top of the left front tire and wedged into the suspension springs. The decedent's credit card was found inside one of the gloves. *See* Document 19, pg 19.

The only claim surrounding these facts raised before this Court and the state appellate courts was whether the parole officer was required to give Chruby his *Miranda* rights. There are no separate claims regarding the validity of the arrest warrant or the search of Chruby at the time of arrest.

The Pennsylvania Superior Court found that Chruby, like the defendant in *Minnesota v. Murphy*, 465 U.S. 420 (1984), while being interviewed by the parole officer was not subject to formal arrest or restraint on freedom of movement and, thus, was not entitled to be advised of his *Miranda* rights. Despite Defendant's contentions, the record demonstrates that this conclusion was not based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Furthermore, even if the parole officer asked questions as requested by the police, this does not change the fact that Chruby was not in a custodial setting.

Moreover, it is undisputed that the police intended to arrest Chruby based on the outstanding warrant after his interview with his parole officer. Chruby was arrested after his

interview but prior to the police officer consulting with the parole officer regarding Chruby's responses to the questioning. The police officers arrested Chruby without the benefit of knowing his responses to their questions. The arrest clearly was not based on the questions asked by the parole officer. The discovery of the car key and Walnut Street parking garage stub was a result of his being searched incident to his arrest on an outstanding warrant. There is no need to engage in a discussion regarding inevitable discovery or the independent source doctrines. The two doctrines deal with evidence which was first acquired unlawfully but eventually would have been discovered under lawful means. *See Nix v. Williams*, 467 U.S. 431 (1984) (Purpose of the inevitable-discovery rule, i.e., that evidence would ultimately or inevitably have been discovered notwithstanding constitutional violation, is to block setting aside conviction that would have been obtained without police misconduct.) *See also Murray v. United States*, 487 U.S. 533 (1988) (Independent source doctrine permits introduction of evidence initially discovered during, or as a consequence of, unlawful search, but later obtained independently from lawful activities untainted by initial illegality). Even assuming that the parole officer was required to advise Defendant of his *Miranda* rights, the car key and parking stub were not found as a result of unlawfully obtained statements but were discovered during a search conducted pursuant to a lawful arrest. Defendant's argument concerning the requirement for a *Miranda* warning is rejected.

IV. Denial of effective assistance of counsel

Chruby next claims that trail counsel was ineffective for telling the jury during his opening remarks that the defendant would testify but then subsequently did not call him to the stand. The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 688, 684, *reh'g denied,* 467 U.S. 1267 (1984), held that the test for judging any claim of

ineffectiveness of counsel is whether the counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. The Court developed a two-prong test requiring the defendant to show that: (1) counsel's performance was deficient and, (2) the deficient performance prejudiced the defense. Prejudice has been defined as a "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. *See also Frey v. Fulcomer*, 974 F. 2d 348, 358 (3d Cir. 1992), *cert. denied,* 507 U.S. 954 (1993) ("[A] Defendant must demonstrate a reasonable probability that, but for the unprofessional errors, the result would have been different . . . . "). In order to establish ineffective assistance under *Strickland*, a habeas Defendant must: "show that his attorney's representation fell below an objective standard of reasonableness" and "any prejudice which appears prejudiced the defense." *Deputy v. Taylor*, 19 F.3d 1485, 1493 (3d Cir.), *cert. denied*, 512 U.S. 1230 (1994).

The Pennsylvania Superior Court found that trial counsel was not ineffective when he stated in his opening statement that Defendant would testify, and when he was not called, because there was no evidence that counsel interfered with Defendant's right to testify. Additionally, there was no prejudice because the trial court instructed the jury that he had a constitutional right not to testify. Defendant challenges this finding by pointing out that in post-sentence motions, he stated that counsel had convinced him not to take the stand and told him that "if [he] took the stand, [he] was going to get the needle." *See* Doc. 113, p.2. But Defendant also stated that he was not ready to testify because counsel did not prepare him to take the stand. *See id.*; Doc. 29, p.9. This statement that he was unprepared to testify appears to conflict with Defendant's claim that he was prevented from testifying by trial counsel. Furthermore, he testified at the post-sentencing hearing that he had accepted counsel's advice that he "would

be better off not testifying." Doc. 19, p.22. The weight of the prosecution's evidence frequently results in a subsequent decision not to take the stand. Nevertheless even assuming that Defendant's statements are true, they are still insufficient to establish that counsel interfered with his right to testify. Supreme Court precedent, as previously identified, does not require a contrary result.

Assuming, *arguendo,* that trial counsel failed to honor Chruby's request to testify, Defendant fails to show how he was prejudiced. The Superior Court correctly noted Chruby has not demonstrated, nor can the court discern from an independent review of the record, that he was prejudiced by counsel's action. Defendant contends that the Superior Court did not fairly consider his testimony in the hearing on his post-sentencing motions, *see* Document 13, pg(s) 22-23, but, as previously noted, this evidence was insufficient to undermine the court's analysis and conclusions that there was no interference. Defendant has not identified his purported testimony and how it would have contradicted or challenged the Commonwealth's evidence. In sum, there was no showing that counsel was ineffective under *Strickland* because of his opening statement to the jury or by his advising Defendant not to testify. Further, Defendant has not demonstrated that counsel's alleged deficiencies deprived him of a fair trial. Finally, any contention that the Pennsylvania Superior Court's determination of the facts was unreasonable, or that its decision involved an erroneous application of clearly established federal law, is baseless.

Conclusion

The petition will be denied and an appropriate order will enter.

/s/ William J. Nealon
United States District Court

Date: June 11, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed Jun 11, 2001]

CIVIL NO. 3:CV-00-1247
(Judge Nealon)

WALTER ALAN CHRUBY,
Defendant

v.

FRANK D. GILLS, *et al.*,
Respondents

AND NOW, THEREFORE, THIS 11TH DAY OF JUNE, 2001, IT IS HEREBY ORDERED THAT:

1. The petition for writ of habeas corpus is denied.
2. The Clerk of Court is directed to close the case.
3. Based on the court's decision herein, there is no basis for the issuance of a certificate of appealability.

/s/ William J. Nealon
WILLIAM J. NEALON
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2913

WALTER A. CHRUBY,

Appellant

v.

FRANK D. GILLIS, SUPERINTENDENT, SCI COAL TOWNSHIP,

Appellee

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(3:CV-00-1247)
District Judge: The Honorable William J. Nealon

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO and FUENTES, *Circuit Judges* and FULLAM*, *District Judge*.

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having

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* The Honorable John P. Fullam, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ [Illegible]
United States Circuit Judge

DATED: JAN 13 2003

Clu/cc: Nia Lena Caravasos, Esq.
F. Emmett Fitzpatrick Jr., Esq.
Lee G. Nollau, Esq.
John M. Updegraph, Esq.
John Andrews, Esq.
Mark S. Smith, Esq.
Ray F. Gricar, Esq.

APPENDIX D

In The
UNTIED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CIVIL NO. 3:CV-00-1247

WALTER CHRUBY

v.

FRANK GILLIS,
Superintendent, SCI Coal Township

I, Walter Chruby (Appellant), being duly sworn according to law, depose and say the following:

1. That my family retained attorney Gary Lysaght on or about the month of October, 1995 to represent me at trial, in which, the Commonwealth of Pennsylvania was seeking the death penalty;

2. That at my first meeting with attorney Lysaght (October, 1995) I explained my version of events that led up to my being arrested and charged with first degree murder;

3. That I have always maintained my absolute innocence regarding the murder or ever being at the victims home;

4. That after this meeting attorney Lysaght stated that we would offer a timeline/alibi defense;

5. That from the moment attorney Lysaght was retained I made it absolutely clear that I wanted to testify;

6. That attorney Lysaght advised me of the potential dangers of testifying, these included;

   a) that my prior criminal record would come in.

   b) that there was the potential that a jury may not believe me.

   c) that if the jury did not believe me, I may run a greater risk of receiving the death penalty.

7. That after this discussion with attorney Lysaght, I repeated my decision to testify;

8. That attorney Lysaght told me, my family and the three other attorneys involved with my defense that he would offer a timeline/alibi defense and that he had obtained all of the critical evidence/witnesses that were to support my testimony;

9. That attorney Lysaght came to me just prior to the start of trial and stated that he would be making a *delayed opening statement*. His stated reason for doing this was that he wanted to have the opportunity of hearing the Commonwealth's entire case against me before informing the jury that I would indeed testify;

10. That at the close of the Commonwealth's case and after careful discussion with attorney Lysaght, attorney Nollau, attorney Cooper, attorney Locascio and my family, I repeated my decision that I would testify;

11. That attorney Lysaght told the jury, numerous times, in his delayed opening, that I would testify and offer my version of events;

12. That attorney Lysaght was fully aware of my testimony and that I have never altered my version of events in any way, shape or form;

13. That attorney Lysaght, in his delayed opening, told the jury that I had used the victim's credit card and that I had committed credit card violations in the past;

14. That *I never used the victim's credit card nor have I ever been charged with using any ones credit card illegally. And, that I so informed attorney Lysaght on numerous occasions prior to trial;*

15. That attorney Lysaght's statements to the jury left me in the position of having to commit perjury if I took the stand or to directly contradict attorney Lysaght's misrepresentations;

16. That only after Lysaght's delayed statement did I find that he had prepared no defense to present;

17. That after attorney Lysaght offered his delayed opening he started to threaten me with the claim "that I would get the needle" if I took the stand;

18. That I begged attorney Lysaght to offer the defense, evidence and witnesses that he stated he had secured for over 18 months so as to support my testimony;

19. That attorney Lysaght told me that his private investigator was serving subpoenas as trial progressed;

20. That the other attorneys involved with my defense contacted attorney Lysaght's private investigator, only to find that he did not even know that my trial had started and had not spoken to attorney Lysaght in month's regarding my case;

21. The reason I did not testify was that attorney Lysaght completely interfered with my ability to do so by, but not limited to the following;

    a) That attorney Lysaght misled everyone involved with my defense as to his complete lack of preparation

b) That attorney Lysaght failed to obtain any evidence/witnesses that would have supported my testimony, though at the time of the delayed opening Lysaght stated that the defense, as planned, was completely ready

c) That, after his delayed opening, attorney Lysaght graphically threatened me with the nature of dying by lethal injection, and

d) That attorney Lysaght misrepresented important facts to the jury

22. That attorney Lysaght, after his delayed opening, attempted to compel me to offer one of two statements he fabricated;

23. That I asked attorney Lysaght to be allowed to tell the truth;

24. That I never asked anyone involved with my defense to do anything unethical either pre-trial, during trial or after my conviction;

25. That I testified at the Post Conviction Evidentiary Hearing that the reason I did not testify was due to the fact that attorney Lysaght had not prepared for me to testify (truthfully);

26. That attorney Lysaght's claim of "ethical problems" at the Post Conviction Evidentiary Hearing were nothing more than a weak and unethical attempt to insulate himself from his ineffective representation;

27. That attorney Lysaght never discussed with me any ethical problems he would encounter if I took the stand;

28. That I did not murder Ruth Fergus, that I have never been in the residence of Ruth Fergus. That I was in possession of the Fergus vehicle but I only took it when I found it far from the victims home.

WALTER CHRUBY
/s/ Walter Chruby

Sworn to and subscribed before me this 9th day of July, 2001.

/s/ James O. Lindberg
Notary Public

NOTARIAL SEAL
JAMES O. LINDBERG, Notary Public
Coal Township, Northumberland County
My Commission Expires June 23, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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§2254 MOTION
0335 M.D. Allocatur Docket 1999

WALTER CHRUBY,

v.

FRANK GILLIS.
Superintendent, SCI Coal Township.

AFFIDAVIT

I, Stephanie L. Cooper, Esquire, being duly sworn according to law, depose and say the following:

1. that I served as co-counsel in the homicide trial of Walter Chruby;
2. that upon joining the defense, I met with attorney Gary Lysaght and had a detailed discussion regarding Mr. Chruby's version of events on the day of the homicide, at which time Mr. Lysaght stated that he was planning to offer a timeline/alibi defense;
3. that my pretrial interview with Mr. Chruby clearly indicated that this timeline/abibi defense would prove to be the most effective to Mr. Chruby;
4. that Mr. Chruby intended from the onset to testify at his trial and had prepared to do so and explain his whereabouts at the time of the homicide;
5. that Mr. Lysaght confirmed unequivocally to Mr. Chruby, members of his family, and co-counsel that he had obtained critical evidence and witnesses that would support his testimony;

6. that Mr. Chruby clearly intended to explain the statements detailed in #2, #3, #4 and #5 of this Affidavit to the jury during his testimony;

7. that Mr. Chruby further intended to explain to the jury that after finding the victim's car abandoned and unoccupied, he took it because he was in desperate need of transportation;

8. that Mr. Chruby also intended to explain to the jury that the victim's credit card had been left inside the abandoned vehicle;

9. that Mr. Lysaght chose to offer a delayed opening statement because he was not familiar enough with the case against Mr. Chruby. At the completion of the Commonwealth's case, Mr. Lysaght made the decision to tell the jury, numerous times, that Walter Chruby would indeed testify;

10. that at the onset of the defense portion of the case, it became painfully apparent that Mr. Lysaght had prepared absolutely no defense whatsoever. Contrary to Mr. Lysaght's prior assurances, neither a single witness had been subpoenaed nor a single piece of evidence had been obtained to support Mr. Chruby's version of events;

11. that the moment co-counsel learned that Mr. Lysaght had prepared absolutely nothing, it was suggested to Mr. Chruby that co-counsel have an ex parte meeting with the trial judge and request that a continuance be granted so that either Mr. Chruby could retain new lead counsel or, in the alternative, co-counsel could have more time to prepare to offer a defense. This request for a continuance was handled ex parte so that the Commonwealth would not be alerted to the fact that no defense had been prepared;

12. that this request for a continuance was denied by the trial judge and Mr. Chruby was left with the options of proceeding either pro se or without lead counsel who was prepared for the guilt phase;

13. that Mr. Lysaght continued to stick with his deception and stated that the private investigator was subpoenaing the witnesses as the trial progressed;

14. that penalty phase counsel (Lee Nollau, Esquire) contacted Mr. Lysaght's private investigator only to find that he had no idea that Mr. Chruby's trial had even started and had not spoken to Mr. Lysaght in months regarding this case;

15. that, at this point, Mr. Nollau and I did our best to assemble some sort of defense. Unfortunately, however, we were unable to do this in an effective manner and were left with presenting the type of evidence appropriate for a penalty phase;

16. that prior to Mr. Lysaght's delayed opening statement, there was never any question that Mr. Chruby would take the stand in his own defense and offer the timeline/alibi version of events;

17. that prior to Mr Lysaght's delayed opening statement, Mr. Chruby was never counseled against testifying;

18. that prior to Mr. Lysaght's delayed opening statement, he never attempted to threaten or coerce Mr. Chruby into not taking the stand;

19. that I was present during the conversation in which Mr. Lysaght relentlessly pressured and clearly coerced Mr. Chruby into believing that "if he took the stand he was going to get the needle";

20. that I was present when Mr. Chruby repeatedly asked Mr. Lysaght to present the defense witnesses and evidence that Mr. Lysaght had previously confirmed were prepared to support Mr. Chruby's testimony;

21. that I was present when Mr. Chruby finally acquiesced under this coercion due to the lack of supporting witnesses/evidence as well as the repeated commentary that he was going to get the needle;

22. that Mr. Chruby never asked anything but to be allowed to tell the truth to the jury;

23. that Mr. Chruby was very well prepared to testify to what transpired. That testimony would have directly contradicted the Commonwealth's totally circumstantial case;

24. that Mr. Chruby never asked me to do anything unethical, nor did any other member of the defense team tell me that Mr. Chruby had asked them to do anything unethical, nor did Mr. Chruby tell me that he intended on changing his testimony or perjuring himself before the jury; and

25. that I was unable to submit an affidavit or to testify to these events at the post-conviction evidentiary hearing or during direct appeal to the Superior Court since I continued to serve as counsel for Mr. Chruby.

/s/ [Illegible]
STEPHANIE L. COOPER, ESQUIRE

Sworn to and subscribed before me this 21st day of June, 2000.

/s/ Deborah K. Smith
Notary Public

Notarial Seal
Deborah K. Smith, Notary Public
Bellefonte Boro, Centre County
My Commission Expires Apr. 19, 2003
Member, Pennsylvania Association of Notaries

In The
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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§2254 Motion
0335 M.D. Allocatur Docket 1999

WALTER A. CHRUBY,

V.

FRANK GILLIS,
Superintendent, SCI Coal Township.

AFFIDAVIT

I, JOSEPH ACCORDINO, JR., being duly sworn according to law, depose and say the following:

(1) that I am Mr. Chruby's brother-in-law and that I retained Gary Lysaght, Esquire regarding the representation of Mr. Chruby in the first degree murder case in which the Commonwealth was seeking the death penalty against him;

(2) that, per Mr. Chruby's request, I was closely involved in the planning/strategy of the case with Mr. Lysaght and co-counsel;

(3) that there was never any question regarding Mr. Chruby's desire to testify;

(4) that after Mr. Chruby explained his version of events, it was jointly decided between Mr. Chruby, his counsel, and his family that a timeline/alibi defense would be offered;

(5) that Mr. Lysaght assured Mr. Chruby, his counsel, and his family that he had obtained critical evidence which would have served to support Mr. Chruby's testimony. Such evidence included, but was not limited to, the following:

(a) Phone Records which would have proven that it was impossible for Mr. Chruby to have made the phone call from his motel room to the home of the victim. Mr. Lysaght insisted all along that he had these records, and it was not until the trial started that he admitted not having these records;

(b) that Mr. Lysaght confirmed that he had obtained the records which would have proven that Mr. Chruby did not leave FCI Butner with the belt linking him to the murder;

(c) that when I asked to see these records, Mr. Lysaght stated that he had never investigated their existence;

(d) that when I asked Mr. Lysaght shortly before the start of the trial why he had not obtained these records, he assured me that he had filed a *motion in limine* to suppress this belt and that the motion had been granted by the trial judge;

(e) that no such *motion in limine* was ever filed and, consequently, this damaging link in the Commonwealth's case was admitted at trial;

(6) that in a meeting which occurred just prior to the start of trial and which included attorney Peter Locascio, attorney Stephanie Cooper, attorney Lee Nollau, attorney Gary Lysaght, Walter Chruby, and myself, Mr. Lysaght suggested that a delayed opening statement be offered so that he would have the

opportunity to hear the Commonwealth's entire case before promising the jury that Mr. Chruby would indeed testify;

(7) that only after Mr. Lysaght gave his delayed opening statement did we learn that he had neither contacted nor subpoenaed a single witness. Further, not one shred of evidence to support Mr. Chruby's testimony had been obtained;

(8) that when it became apparent that absolutely no defense had been prepared, Mr. Lysaght came to me after his delayed opening statement and asked me to relay the following fabricated defense to Mr. Chruby:

(a) that while Mr. Chruby was burglarizing the victim's home, the victim returned and attacked Mr. Chruby with a knife. During this attack, Mr. Chruby took the knife, killed the victim, and stole her vehicle in a panic;

(9) that when I presented this fabricated tale as offered by Mr. Lysaght, Mr. Chruby instructed me in a very heated manner to tell Mr. Lysaght he would neither fabricate a totally false defense nor would he perjure himself before the jury;

(10) that this 11th hour defense had never before been mentioned and was suggested only after Mr. Lysaght's delayed opening statement;

(11) that I was present when Mr. Lysaght, in a very abusive manner, coerced Mr. Chruby into not taking the witness stand;

(12) that I was present when Mr. Chruby begged Mr. Lysaght to allow him to testify and present the witnesses/evidence that would have supported his version of events;

(13) that I was present for all interactions between Mr. Chruby and Mr. Lysaght that interfered with Mr. Chruby's right to testify;

(14) that Mr. Lysaght never mentioned having an "ethical problem" with Mr. Chruby's purposed testimony prior to the post-conviction evidentiary hearing; and

(15) that Mr. Chruby never asked anyone to do anything unethical while in my presence, nor did anyone ever mention any such request/suggestion to me.

/s/ Joseph Accordino, Jr.
JOSEPH ACCORDINO, JR.

Sworn to and subscribed before me this 6th day of July, 2000.

/s/ Janet B. Riecken
Notary Public

JANET B. RIECKEN
A Notary Public of NJ
My Commission Expires 3/19/2002